86-1129

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86- .....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

---o---

In Re PAUL G. EVANS

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Respondent

---o---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Respondent's counsel unknown

Paul G. Evans, pro se
110 Merrain Road
Palm Beach, Fl. 33480
305-844-3382

QUESTION PRESENTED FOR REVIEW

Was your petitioner Evans denied procedural due process and his rights under the First Amendment by the United States District Court for Maryland in disbarring him? This Court is requested to review the ruling set forth in the published opinion of the Court of Appeals in No. 86-1569, decided September 23,1986, affirming the en banc Order of the United States District Court for the District of Maryland disbarring your Petitioner, Paul G. Evans (Evans), on February 12,1986, from practicing law thereat, In re Paul G. Evans, Misc. No. 2591, which was based upon the Report & Recommendation of the Hon. James R. Miller, Jr. (Judge Miller) of February 5,1986, and initiated first through letters from the Disciplinary Committee of such Court from Judge Miller to Evans dated September 24,1985, November 5,1985, and November 11,1985, and a Show Cause Order of the Hon. Herbert F. Murray (Judge Murray) dated January 9,1986.

The disbarment grew out of, and was apparently based solely upon, a private letter written on June 24,1985 by

Evans to Magistrate Frederic N. Smalkin (Magistrate Smalkin):

> I write you regarding your Report & Recommendation in a matter captioned Rogers v. Heath, JH 80-855 dated and filed September 11,1984, and enclose herewith a copy of my Motion for Summary Reversal which was denied without opinion on June 12,1985, No. 84-2380, and a copy of my brief without the table of contents.
> I feel your Report was either the result of your incompetence in the matter or perhaps worse and reflected a Jewish bias in favor of the Kaplan firm whose actions were in my judgment inexcusable in this cause. If in fact it represents incompetence I will drop the matter but if it is a Jewish bias I will file a complaint under the Rules for Handling Complaints of Judicial Misconduct or Disability.
> Before I take such action I afford you an opportunity of setting forth your reasons for your prejudiced and incomplete Report.

PARTIES

Evans is the respondent and there is some doubt as to whether the United States District Court for the District of Maryland or the 8 judges thereof who signed the disbarment Order, or both, is the necessary adverse party. The Circuit Court appointed Peter F. Axelrad of 300 East Lombard Street, Baltimore, MD 21202,to represent the trial Court on appeal and Evans appeared pro se throughout. The trial Court did not proceed by counsel below.

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OPINIONS BELOW

The published opinion of the Court of Appeals is dated September 23, 1986, and is set forth in Petitioner's Appendix, P.A., at 22. At the writing hereof a citation therefor was not available to Evans [801 F.2d 703]. The Daily Record of Baltimore in its September 29,1986 edition at p.1 col.1 comments on the slip opinion and its October 2, 1986, edition at section 2, p. 14 contains comment under the Letters to Editor Section. P.A. 40 & 43.

The Court's Order of July 2,1986, denying Evans' motion to supplement record with attachments to Smalkin's complaint, P.A. 16.

The opinion and orders of the trial court are in chronological order and none is published:

1. Judge Murray's Show Cause Order of January 9,1986, P.A. at 1.

2. Judge Miller's Report & Recommendation of February 5,1986, P.A. 4.

3. En banc Disbarment Order of February 12,1986, P.A. 14

4. Memorandum of Smalkin to Judge Black without

attachments of July 2,1986, P.A. 18.

5. The letter of Evans to Smalkin of June 24,1985, P.A. 19, and the response thereto of June 26,1985, P.A. 20

6. Six letter correspondence between Judge Miller and Evans from September 24 to November 18,1985, P.A. 84-89.

The following Opinions in Underlying case, Brown v. Rogers, C A JH 80-855, No. 84-2380, cert denied. No. 85-2008 10-6-86:

Smalkin's Report & Recommendation of September 11, 1984, P.A. 49.

Memorandum Opinion of Judge Howard of November 19,1984, P.A. 65.

Unpublished Opinion of 4th Circuit of January 2, 1986, P.A. 75.

THE GROUNDS FOR THIS COURT'S JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The Order of the Fourth Circuit denying rehearing is dated October 17,1986, P.A. 48 and 90 days therefrom is January 16, 1987.

STATUTES, RULES AND CANNONS INVOLVED

Petitioner relies upon The First and Fifth Amendments to the United States Constitution.

Petitioner relies on the following statutes and rules:

1. 28 U.S.C. § 372

2. Rules For Handling Complaints of Judicial Misconduct or Disability of Fourth Circuit Judicial Council

3. 18 U.S.C. §§ 401 and 402

4. F.R. Crim. P. 42

5. Local Rule 2A—Model Federal Rules of Disciplinary Enforcement adopted by Maryland U.S. District Court

6. Maryland Code of Professional Responsibility, Cannons 1, DR 1-102(A)(5); Cannon 7, DR 7-106(C)(6); and Cannon 8, DR 8-102(B) set forth at Maryland Rules of Procedure.

7. 28 U.S.C. § 636(b)(1)(B) and (e)

8. F.R.Civ. P. 72

9. 28 U.S.C. § 1332

STATEMENT OF THE CASE

Evans was admitted in New York in 1950 and thereafter was an associate at Messrs. Cravath, Swaine &

Moore. He left in 1955 to work for the legal department of Allied Chemical and later became head of the legal department of IBM. Subsequently he was chief legal officer and secretary of The National Sugar Refining Company and head of industrial relations at Sperry Rand. In 1970 he moved to California and engaged primarily in the practice of criminal law. He returned east in 1976 and was employed by Public Citizen, a Ralph Nader group, and as a self-employed trial lawyer. Evans never had been accused of bizarre behavior or incompetence and considers himself an experienced and knowledgeable lawyer.

James Brown was referred to Evans by a lawyer to help him in a rather difficult situation. He had been represented by Jeffrey Pritzker and asserted that his counsel had made commitments regarding the settlement of a law suit without Brown's consent or understanding. The case was a simple property damage case arising out of a two car accident but the driver of Brown's car was unknown to him and he was not authorized to have been driving his car in southern Maryland headed apparently for Virginia. The case had been marked settled but apparently

because of a misunderstanding between Brown and Pritzker payment on the settlement draft had been stopped and Pritzker and Brown were no longer able to maintain a lawyer-client relationship. In addition the brother of the driver of Brown's car had lied to and defrauded Brown.

Evans entered his appearance in what apparently was a simple proceeding expecting to go to trial within a short time since a trial date had been set but after the pre-trial conference the apparent settlement had not taken place. Evans did not ascertain until after he had filed a supplemental and cross-complaint that the firm representing the driver of Brown's car also with Pritzker had represented Brown without his authorization or direct knowledge. Thereafter the firm began to paper the case with an unending number of motions many of which were in Evans' judgment frivolous. For example the firm asserted that because of a general, it in fact was a specific, release involving the damages arising from the accident, Brown was by res judicata or collateral estoppel precluded from suing in fraud and deceit even though payment was stopped and counsel for the defendants asserted that it had a witness

who could establish that it was the driver of Brown's car who was at fault. To complicate things further Evans underwent back_surgery and retired to Florida while the matter was still pending. He did not attend the second pre-trial conference involving the claim against the driver of Brown's car and his stand-in counsel was unable to agree upon a pre-trial order with counsel for the driver. A criminal case interposed itself and the matter was continued without a date certain for trial. The matter was referred to a magistrate to decide all pending motions who scheduled a hearing, cancelled it, and without ever giving Brown an oportunity to argue his position or present evidence recommended it be dismissed on the ground that the court lacked jurisdiction because the amount invovled was less than $10,000. The magistrate in so ruling among other things failed to read or consider Brown's motion for partial summary judgment on the ground of pendent jurisdiction. The trial judge adopted in part the recommendation and dismissed on jurisdictional grounds. On appeal the Fourth Circuit denied without opinion Brown's motion for summary reversal and by an unpublished opinion

without oral argument sustained the trial court's action. Evans shortly after the denial of summary reversal wrote the magistrate a private letter in which he criticized his actions and suggested that perhaps he was prejudiced against Brown and in favor of the Jewish law firm that represented the driver. Evans' purpose was to put the magistrate on notice that he was considering filing a complaint if in fact bias and not incompetence was the reason for the report's recommendations. The magistrate did not deny bias but asserted he never gave the appearance of bias and after receiving a copy of Evans' complaint to the Judicial Council of the Fourth Circuit complained to the Disciplinary Committee of the District Court about Evans' private letter. The Committee by Judge Miller sought an explanation from Evans but refused to proceed until after the appeal had been finally determined. Evans objected to any delay on the ground of prejudice to his client. Unknown to Evans the magistrate had been proposed as a U.S. District judge and the matter was pending in the complicated and slow process of selecting candidates and securing their confirmation in the Senate. In

addition the relations between Miller and Evans were far from cordial. Evans sought an early hearing, sought the names of the Judges who would hear the matter in order to seek the recusal of those he felt biased, and sought an evidenciary hearing at which he would have an opportunity to question the Magistrate and subpoena his records. He was denied any hearing and found guilty by the Miller Report, although Evans asserted he would move to recuse him if he were one of the judges hearing the case. In fact 8 of the 10 active judges in the District signed the so-called en banc disbarment order. Only four of then were listed by Miller as judges who would hear the matter. The Order on its face only provides the court had considered the Report of Miller without reference to the reply to the Show Cause Order charging Evans and the written evidence submitted by him. The Report found Evans wanting in moral character whereas the Show Cause Order merely charges that he violated disciplinary rules by writing a letter. The Report also emphasized Evans' truculence and stubbornness in presisting in defending himself and seeking a public hearing on the charges against him.

The Fourth Circuit went further and cited cases of disbarment involving lawyers who obviously were mentally disturbed. In addition it refused to accept the applicability of the First Amendment, found the letter obstructed justice when in fact the Circuit never heard of it until after the underlying case had been affirmed, and held Evans was not entitled to or waived a hearing. It further engaged in fact finding by stating a hearing would not have helped Evans.

Hereinafter is set forth in greater detail the background of the underlying case and the contempt proceedings. Evans is of the opinion the the errors set forth in the Report & Recommendation of Smalkin highlighted herein justify the actions taken by him and in any event his actions do not justify disbarment without a hearing. Further he argues that he acted reasonably within the confines of 28 U.S.C. § 372 and the Rules thereunder and would never as a matter of principle file a complaint against anyone without prior notice. Lastly he contends that he in fact did not violate the Cannons referred to in the Show Cause Order.

UNDERLYING CASE

LOUIS ROGERS (Louis or Lewis) and JAMES BROWN (Brown) on April 9,1980, initiated an action, C A No. JH 80-855, in the U.S. District Court for Maryland seeking damages for personal injury and property damage, respectively, arising out of a two vehicle accident on October 30,1979, near Pokomoke, Maryland on the eastern shore. Louis was driving Brown's 1977 Mark V Lincoln Continental which was destroyed by a tractor trailer driven by WALTER HEATH (Heath) while in the course of his employment by WHEATLEY TRUCKING,INC. (WHEATLEY). There was complete diversity, Louis was a resident of New Jersey, Brown of Michigan, and Heath and Wheatley of Maryland. Louis rear ended the tractor trailer as it was making a U turn in the early hours of the morning. The complaint was signed by KAPLAN, HEYMAN, GREENBERG, ENGELMAN & BELGRAM (Kaplan firm) of Baltimore and ARTHUR WEBSTER (Webster) of Saliabury on behalf of the two plaintiffs but Webster noted to the Clerk and the docket sheet so reflects that he represented Louis only. A proposed pre-trial order lodged with the Court set forth

damages for Louis in excess of $ 10,000 and for Brown $9,000 "for property damage to his vehicle". Thus the order fails to claim loss of the use of the Mark V. The complaint prayed for damages of $250,000 and $12,000 respectively. The proposed order was signed by the Kaplan firm on behalf of the two plaintiffs, by Webster, and by E.B. Harris, Jr. (Harris), counsel for the defendants. It was lodged with the trial judge, the Hon. Joseph C. Howard, on February 12, 1981, at the pre-trial conference. Jeffrey Pritzker of Baltimore entered his appearance on January 13, 1981, as "co-counsel" for plaintiffs—in fact he only represented Brown, paper number (NR) 13, and sought leave of court and withdrew on September 10,1981, some 8 months later without filing any other documents or appearing at any proceedings. His name does not appear on any other court documents including the proposed pre-trial order. Pritzker did however initiate a companion action in the Circuit Court for Dorchester County (state action), No. 4335 CIVIL, on May 10,1980, seeking damages for the loss of his Mark V as well as loss of the use thereof from October 30,1979 to date of $25,000. Louis's brother

GEORGE ROGERS (George) through Webster sought leave to intervene on September 18,1980, and alleged he was damaged by reason of an oral contract made with Brown on September 13,1979, by which he was to sell the Mark V and retain all proceeds over $7,000 as his commission, as well as $1,571 he expended to prepare the Mark V for sale. His declaration prays for damages of $12,000. The same defendants were in the state action as the federal one, and Brown's declaration differed in the state case in that he alleged damages of $25,000 in lieu of $12,000. The state action was dismissed without prejudice as to George on July 14,1982 and as to Brown on July 19,1982. A certified copy of the docket entries was obtained sua sponte by Magistrate Smalkin on September 5,1984, and made a part of the record in the federal matter. The only other relevant matter regarding the state action is that the Kaplan firm in its letter to Judge Howard of November 16,1982, regarding a proposed pre-trial order states that: "suit was filed in the Maryland courts by Brown and Louis Rogers". In fact Louis never appeared in the state action and as a practical matter it would have been difficult to

obtain jurisdiction over him there on the conspiracy and fraud and deceit counts under the supplemental and cross-complaint in the federal case since those alleged torts occurred outside the state. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) regarding the scope of state long arm statutes. Thus Brown as a practical matter had to rest his suit in the federal court where he had jurisdiction over Louis since he was the only percipient witness to the accident known to Brown and if Louis failed to prove liability against Heath his claim for the loss and the loss of use of his Mark V would be barred by res judicata or collateral estoppel. He accordingly instructed Pritzker to commence an action in the federal court which was done not by Pritzker but the Kaplan firm without Brown's knowledge or consent.

The federal cause proceeded without incident and on February 17, 1981, Judge Howard entered on Order, NR 14, dismissing the case without prejudice of the right of a party to reopen within 45 days, by April 3,1981. On March 25, 1981, the case was marked "AGREED, SETTLED AND PAID" NR 15. In fact Louis was paid in full in excess of

$10,000, and the underwriters prepared a sight draft in the sum of $7,500 dated February 24,1981 payable to Brown, George, who was not a party, Pritzker, and Webster,"their attorney". That draft was first endorsed by George, Pritzker,and Webster and sent to Brown. Brown presented it to his bank in Michigan for payment and simultaneously sent his check to Pritzker for his services. The next day Pritzker by telephone told him he was required to pay George $500 according to the agreement he made with the defendants' counsel. Brown refused and payment was stopped on the draft. Brown discharged Pritzker and retained the undersigned who by motion of July 28,1981,NR 16, some 116 days beyond the termination date set forth in Judge Howard's Dismissal Order, sought leave to reopen the matter and sue Louis as a cross-defendant and George as an impleaded one, as well as Heath and Wheatley. He annexed to such motion a copy of Brown's affidavit of December 31,1979, and attachments thereto, documents setting forth the security interest of Brown's credit union in the Mark V pursuant to a purchase loan of $9,000, the cost of the Mark V including $ 1,959.46 in financing

charges, of $17,263.46, a letter to the defendants' insurance underwriters of January 4,1980, requesting that all checks in payment for the Mark V be made payable to his credit union and Brown, a statement from Brown's collision insurer stating his policy on the Mark V lapsed on October 5,1979, 25 days before the accident; a letter of January 2,1980, to the claim agents of the underwriter, attention Mr. Purnell, stating the Mr. Webster did not represent Brown and any settlement checks be sent to his credit union and be made payable to the credit union and Brown. Copies of the foregoing as well as the dishonored draft were made a part of Brown's deposition of August 25, 1982,and duly filed as part of the Record by the Kaplan firm on October 29, 1982, NR 36. On January 18,1982, Judge Howard entered an Order, NR 18, granting Brown's motion of July 28, 1981, which had not been opposed by any of the parties. On March 24, 1982, a Supplemental and Cross-Complaint was filed by Brown, NR 19, and on May 26,1982, NR 26, he filed a motion for partial summary judgment under Counts I and II alleging a conspiracy to defraud and fraud and deceit against George and Louis, but

without prayer for a dollar amount under Count III against Heath and Wheatley. On June 11, 1982, the Kaplan firm filed an Answer to the complaint which was served on George and Louis on April 8 and 10, respectively, as well as a Response, two separate documents, NR 28. Thereafter the firm served by July 16,1983, the date of the reference to the Magistrate, NR 58, some 22 other pleadings as well as pre-trial letters to Judge Howard and letters supplementing prior pleadings: 29 Motion to strike Brown's affidavit; 31 Notice to take deposition of Brown; 32 second notice; 33 Notice (second amended); 34 Motion to enlarge time until October 27,1982, to file motions; 35 Motion for Summary Judgment; 36 Brown's deposition with exhibits filed; 37 Motion for Sanctions; 39 Motion to Strike Response of Brown to Motion of Rogers for Summary Judgment, NR 44; 40 Notice to reconvene Brown's deposition; 41 Motion to Enforce Settlement Agreement; 42 Reply of Rogers to Response of Brown,(see paper 44) to Motion of Rogers for summary judgment; 43 Supplemental Memorandum; 46 Reply of Rogers to response of Heath and Wheatley to motion to enforce settlement agreement; 47

Second Motion for Sanctions; 48 Deposition of Brown taken on 11/23/82 (deponent did not appear); 49 Motion to strike response of Brown [see paper 50]; 52 Reply to Brown's Opposition to Rogers Motion; 53 Motion for Discovery Sanctions; 54 Motion to seal paper 55; 57 Reply to Response of Brown [paper 55].

The Clerk on November 22,1982, NR 44, summarily returned Brown's Opposition to Motions for Summary Judgment on the ground Local Rule 3 required that he maintain a local address. Evans responded by letter citing the then pending Supreme Court of New Hampshire v. Piper, 470 U.S.——, 106 S.Ct. 1272, 84 L. Ed.2d 205 (March 4, 1985) and the clerk desisted from rejecting his pleadings on the ground of no local office but failed as ordered, NR 67, promptly to send Evans a copy of Judge Howard's Order dismissing the case.

A scheduling Order was entered June 24,1982, NR 30, setting the jury trial date for the week of November 29,1982, and a pre-trial conference on November 18. The trial was estimated to last 2 days. At the pre-trial conference the parties were unable to agree on a pre-trial

order. By timely notice of Judge Howard that because of an intervening criminal case with priority over a civil matter trial was continued to an unspecified date.

With the case in the foregoing posture Judge Howard on July 16,1983, NR 58, referred the matter to Magistrate Smalkin, now apparently Judge Smalkin who was on September 25,1986, confirmed by the Senate, for the purpose of ruling on pending motions. The Magistrate by letter of August 1, 1984, scheduled a hearing "pursuant to the Rogers' request for hearing filed January 21, 1983,[NR 57] on all matters covered thereby [it is not clear if thereby refers to the Rogers' request or Judge Howard's Order] for September 21, 1984". By letter dated September 7,1984, two days after the certification of the docket entries in the state case, Magistrate Smalkin states:

> As you know, a hearing was scheduled in this case for September 21,1984. Upon a further review of the file, I have determined that the pending matters may be decided without the necessity of an oral hearing. Therefore, pursuant to Local Rule 6 of this District, no oral hearing will be held on the pending matters in this case, and you may disregard the September 21 hearing date previously set.
> Each of you will be receiving, in due course, a copy of my Report and Recommendation to Judge Howard regarding disposition of this

case.

Thus the Magistrate by his Report, NR 59, entered September 11,1983, without hearing, oral argument or request for memoranda dismissed an action involving the total loss of Brown's Mark V on October 30,1979, and the fraudulent conversion thereof on September 13, 1979, which was initiated on April 9,1980,and had been marked on March 25, 1981, NR 15, AGREED, SETTLED AND PAID and for which a trial date had been set. Your Petitioner will set forth in the order they appear in the Report his objections thereto which in his judgment justified his letter of June 24,1985, to the Magistrate for which he was disbarred.

1. "On December 31,1979, George Rogers told plaintiff that the car had been demolished in an accident. According to George Rogers, his brother, Louis Rogers, was driving the car to Virginia[1] to show it to a prospective buyer * * *"

George was an impleaded defendant who did not make any cross-claim or other request for relief in the federal case. His deposition was not taken nor were interrogatories

sent him. The Magistrate does not set forth the source of this statement but the affidavit of Brown states:

> Approximately thirty minutes later Mr. Rogers called and informed me that he had not been honest with me about my car. He went on to state that his brother Lewis Rogers was en-route to sell the car to a prospective buyer outside or around Salisbury, Maryland and a tractor and trailer had run into him, injuring him and demolishing my car.

The Court is asked to take judicial notice that Salisbury is a prosperous community on the eastern shore whereas Painter, Virginia, Louis's home, is a small farming area on the Delmarva penninsula. The accident occurred south of Pokomoke about 36 miles from Painter at about 5:00 a.m. on the road to Painter and Louis had departed from Willingboro, New Jersey, George's home,earlier that day which is some 188 miles from Pokomoke. Louis was employed as a school bus driver and claimed only $5000 damages for loss of wages at the rate of $16.05 per day. First pre-trial order. Thus when Brown spoke with George on December 31,1979, George told him Louis was headed to Salisbury to sell the car not to his home in Painter where it is unlikely there would be a market for the car. In fact Louis was headed home to fulfill his school bus driving job

in all probability. October 30 was a Tuesday. The name of the alleged prospective buyer was never disclosed. In fact it is the foregoing facts on which Brown relies in proving the conspiracy of Louis and George to defraud him. Louis had testified he was enroute to Virginia to sell his car in his deposition, and if the Magistrate accepted this he should have relied upon Louis's statement under oath not George's alleged hearsay utterance.

2. "However, after receiving and depositing his check, he was advised by his counsel[3] that $500 of it was to be paid to George Rogers. When plaintiff adamantly refused to remit any money to George Rogers, payment on the check was stopped by defendants[4]. Plaintiff then rejected the settlement agreement and moved to reopen the case."

The Magistrate did not hear any evidence and could not possibly know if Brown's actions could properly be described as adamant.Furthermore the Kaplan firm asserted that payment on the check was stopped by Pritzker, Memorandum in Support of Summary Judgment, NR 35 p.7, and Harris stated in the defendants answer to Motion to Enforce Settlement Agreement, NR 45, p. 2:

> 3. That on April 29,1981, more than two months after the settlement check was issued, E.B. Harris, Jr., counsel for the respective defendants, instructed Bankers and Shippers Insurance Company to stop payment on the $7,500.00 draft on the advice of plaintiffs' (sic) counsel.

For him to conclude that Pritzker was unconnected with the stop payment directive not only prejudices Brown in a probable suit against Pritzker for malpractice but also is not supported by the record. Finally to conclude that Brown rejected the settlement agreement presupposes that the agreement called for the payment of $500 to Louis, the very fact in issue for which a jury trial was demanded. The Magistrate seems to go out of his way to protect the Kaplan firm and Pritzker to the detriment of Brown.

3. The Magistrate lists only 10 pending motions of the Kaplan firm and exclude's Brown's motion that the Court impose sua sponte sanctions against the firm, NR 55.

4. "The burden rests on the plaintiff to satisfy that the jurisdictional amount is really and substantially involved * * *'It is a settled general rule that, in a suit based upon diversity of citizenship brought against several defendants on separate and distinct claims depending on

their validity upon a common origin, the test of jurisdiction is the amount of each separate claim and not the aggregate amount of the claims.' Feccheimer Bros. Co. v. Barnwasser, 146 F.2d 974, 977 (6th Cir. 1945)."

The foregoing was specifically rejected by the trial judge's Memorandum at fn [2] in respect of Counts I & II on the basis of Griffin v. Red Run Lodge, Inc., 610 F.2d 1198, 1204 (4th Cir. 1979). See also Wright, Miller & Cooper (herein Wright) 14A Federal Practice and Procedure, Jurisdiction 2d § 3703 and § 3702 citing Adolph Coors Co. v. Movement Against Racism, 777 F.2d 1538, 1544 (11th Cir. 1985). Furthermore to cite St. Paul Mercury Indemnity Co. v. Red Cab for the proposition that the defendant seeking dismissal must meet the legal certainty test and one sentence later to assert that the plaintiff has the burden of proof creates patent antinomies. Finally to quote from a 1945 case without reference to current texts like Wright leads to confusion and lack of precision.

> 5. In Maryland the measure of damages for destruction of personal property is the market value of the good at the time and place of destruction * * * Plaintiff can also recover for the loss of the use of his automobile, restricted to a reasonable period during which

the plaintiff was deprived of his vehicle.

The Magistrate does not indicate what a reasonable period is but summarily rejects the claim on the ground it was not properly documented. First he fails to note that the Kaplan firm suggests the period for recovery ended: "Damages if any, for replacement vehicles should cease accruing upon the date Brown negotiated the draft." fn [5] to Motion for Summary Judgment, NR 35 p. 10. Second he fails to note that Brown's purchase note if paid as each semi-monthly installment fell due continued for 47 months from 6/28/77 to April 30,1981; that he lost the use of his car from the defendant Heath's and Wheatley's point of view on October 30, 1979, and thus cost Brown 15 months at $233.18 or $3,497.70; and from the Rogers' point of view from September 13,1979, or 1 1/2 months more = $349.77. He also fails to note the the Kaplan firm concedes that Brown suffered some damage from the loss of use. Motion for Summary Judgment, NR 35 p. 10. Finally Brown's deposition shows that he leased a '76 Cadillac from January 15,1981 until about 4 months ago at $150 per month. The deposition was held on August 25,1982, and

thus the term was over 15 months or $2,250. See also fn[1] to his Report and Joint Appendix to Evans' Appeal of Disbarment pp. 39-48A.

> 6. By his own estimation, as evidenced by the sale agreement between him and George Rogers, plaintiff's vehicle was worth $7,000 at the time of the accident. Even allowing for some reasonable profit on resale, the car's value could not conceivably have exceeded $10,000. Beyond that, aside from the bald allegations that he suffered the loss of the use of his car, no amount has been stated by plaintiff regarding how much was spent (and for what period) in renting a substitute vehicle.

The sale agreement provided for Brown to receive $7000 and contemplated a quick sale in the Philadelphia area. The car was wrecked not sold in Maryland and Brown was required to sue to recover his loss--the value of the Mark V in the Salisbury area. There never was a resale or a profit thereon. The Circuit Court made a finding that the value of the car was $7,500. The foregoing seems to indicate there is some doubt that Brown lost the use of his car that was destroyed on October 30,1979, and the salvage value for which was, against Brown's specific instructions to the claim adjustor, paid to George. What

the Magistrate means by "bald allegations" is not clear but it is submitted the Magistrate imposed on Brown the burden of sustaining the presumption of jurisdiction by proof beyond a reasonable doubt. At any rate Brown was never given an opportunity to prove even the blue book value of the Mark V.

> 7. Plaintiff's second and third counts allege that the Rogers brothers conspired to and actually did commit fraud.

The Magistrate has confused Count III which alleges negligence, a matter he summarily dealt with earlier.

> 8. "In fact plaintiff and Louis Rogers have never met* * * Their only 'connection' is the fact Louis Rogers was driving plaintiff's car at the time of the accident."

The above quoted language was taken apparently from the Kalpan firm's Supplemental Memorandum NR 43 p. 7 which quotes from Brown's deposition. The Magistrate dismisses Counts I & II against Louis on the ground that his fraud grew out of a contract while making a finding that his only connection with the case was his driving the Mark V. This is hardly legal analysis.

> 9. Plaintiff, argues, however, that the claims

> raised in his first and second counts are not torts arising from a contractual relationship[5], but rather are pure tort actions stemming from the Rogers' [it is not clear whether he refers to Louis and George or just George] fraudulent misrepresentations to plaintiff.

It is difficult to understand the Magistrate's conclusion as to Brown's arguments since he has not referred to his motion for partial summary judgment or the authority cited therein and this is the only pleading listed in his Report of Brown. Moreover it would hardly require argument to point out the antinomies between ¶¶ 8 & 9 hereof. If asked the argument would be that the complaint only alleges an oral agreement not a contract and further alleges that the promises made by George were never intended to be performed. Thus there was not only not a prima facie contract but also a failure of consideration if in fact one were alleged.

> 10. Plaintiff voluntarily relinquished possession of his car to George Rogers, and, in fact may actually have initiated the contract (the pleadings are unclear on this detail)[6]. Only <u>after</u> the contract was formed and George Rogers had possession of the auto did it become apparent to plaintiff that George Rogers was unable or unwilling to sell the vehicle[7].

It is submitted that the foregoing approaches an absurdity. The focus of the Magistrate should have been on the state of mind of George, the alleged swindler, when he made his promises not on the time Brown perceived he was bilked. Further to use indiscriminately the term contract and agreement and to assume there were a contract without citing the necessary elements—mutual agreement and consideration— is disappointing. The Magistrate also fails to note that the Kaplan firm in its motion for summary judgment, NR 35 at p. 10, states Brown had no contract with Louis Rogers.

> 11. In addition, with respect to the amounts claimed in Counts I and II, this Court is of the opinion that these claims were not made in good faith, but were alleged solely in order to obtain federal diversity jurisdiction[8]. * * *
> In this case plaintiff's only damages arose from the destruction of his car, which he himself valued at $7,000. * * * The additional damages in the complaint are without any factual basis.

If there ever were a jury question it is set forth in Counts I & II and the affidavit of Brown. For the Magistrate to disregard the fact that George asked for a power of attorney to sell Brown's car at a time he knew the car was demolished and used such power to obtain the

salvage value of the car is outrageous. George even after admitting being dishonest told Brown that Louis was run into by a truck when in fact he rear ended the vehicle and the defendants assert he was asleep.

The foregoing dealt with mistakes set forth in the Report. In addition the Report fails to consider Brown's assertion in his motion for partial summary judgment that his case was pendent to the claim of Louis for personal injuries which exceeded the jurisdictional minimum amount; that Harris, counsel for Heath and Wheatley, did not have pending a motion for summary judgment and filed a trial brief in which he asserts he would seek to prove at trial the claim was for less than $ 10,000 against Heath and Wheatley; that Judge Howard established the law of the case when he granted Brown's motion to vacate the settlement agreement and reopen the case alleging fraud and deceit against George and negligence against Heath and Wheatley; and most importantly that the Kaplan firm represented Brown and filed the original complaint alleging on his behalf damages for loss of the Mark V of $12,000. It is submitted that the foregoing was an admission by

pleadings in the matter or at the very least constituted an estoppel by pleadings to contest monetary jurisdiction. Evans is of the opinion that the Magistrate relied on the Kaplan firm's pleadings but issued his Report making such arguments his own.

Finally the Magistrate failed to set forth clearly marked and numbered findings of fact and conclusions of law but chose to couch his Report in narrative form with intersprinkled findings of fact and legal conclusions. Since the reference was under 28 U.S.C. §636(b)(1)(B), he was obligate ' to act otherwise. See F.R.Civ.P. 72.

DISBARMENT PROCEEDINGS

Evans' letter is dated June 24,1985, and Smalkin's Memorandum to Judge Black July 2,1985. Judge Miller's first letter to Evans is dated September 24,1985, 93 days after Evans' letter and 84 days after the memorandum. It is marked CONFIDENTIAL, refers to the letter as "arguably" a violation of three disciplinary rules and affords an opportunity to set forth in writing any explanation and states the Committee believes it appropriate to defer any action until after the appeal has been resolved. His Report

issued February 5,1986 4 1/2 months later, about one month after the Show Cause Order, finds Evans lacks the necessary mental and character qualifications to continue to practice law in this court. During this interim Magistrate Smalkin was under consideration for appointment as a federal judge. Evans replied by letter of September 27,1985, and objected to any delay. He did not have at the time a copy of the Local Rules but notes that Rule II D. and V A., C., & D. provide:

> D. Upon the expiration of 30 days from service of the notice * * * , this Court shall impose the identical discipline * * *.
> A. When misconduct * * * which * * * would warrant discipline shall come to the attention of a Judge of this Court * * * the Judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding * * *.
> C. To initiate formal disciplinary proceedings, counsel shall obtain an order * * * requiring the respondent-attorney to show cause within 30 days * * * personally or by mail, why the attorney should not be disciplined.
> D. Upon the respondent-attorney's answer * * * if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, this Court shall set the matter for prompt hearing before one or more Judges of this Court provided however that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court the hearing **shall be conducted before a panel of three other judges** * * *.[Emphasis supplied]

Evans when he read the foregoing assumed (1) he was entitled to respond to any order to show cause either by mail or in person and further (2) he was to be judged by a three judge court. He also believed that there was a factual dispute concerning the quality of the Magistrate's Report and his motives in writing the letter. In fact he in spite of two written requests to examine Smalkin under oath, and the assumption that Judge Miller would not be part of the three judge panel, since he removed himself after Evans' last letter and Judge Murray issued the show cause order, found that he would not be afforded any hearing and a so-called en banc panel of 8 of the 10 active judges of the District would decide the matter on the basis of the Report and Recommendation of Judge Miller, a procedure not mentioned in the Local Rule. On January 2,1986, the unpublished opinion of the Fourt Circuit issued and the show cause order shortly followed on the 9th. He also was surprised that the Disbarment Order did not refer to the record but merely the Miller Report.

The Circuit Court in its Opinion faults Evans for not investigating the Magistrate which seems a cruel and unjust

observation when the trial court denied him an opportunity even to question him.

It should be noted that although the trial court refused to act upon the matter until after the appellate court issued its opinion, although it did not delay pending rehearing or petition for certiorari, the matter was kept completely confidential until the Disbarment Order of February 12,1986. Thus the case is not of the type referred to in Matter of Greenfield, 24 A.D. 2d 651, 262 N.Y.S.2d 349, 351 (2d Dept. 1965); cf. In re Murray, 58 Hun 604, 11 N.Y. Supp. 336 (1st Dept. 1890); In re Bevans, 225 App. Div. 427, 431, 233 N.Y.Supp. 439, 443 (3d Dept. 1929); In re Manheim, 113 App. Div. 136, 99 N.Y. Supp. 87 (1st Dept. 1906)); Matter of Rockmore, 127 App. Div. 499, 111 N.Y.Supp. 879 (1st Dept. 1908); In re Carraro, 170 App. Div. 545, 156 N.Y.Supp. 379 (1st Dept. 1915); Matter of Hawes, 169 App. Div. 644, 648, 156 N.Y.Supp. 283, 286(1st Dept. 1915), aff'd on procedural grounds, 217 N.Y. 602, 111 N.E. 211 (1916). Evans did not complain of Smalkin's actions in the appellate court where he would not have an opportunity to defend himself but rather chose the only

procedure open to him of going to the Judicial Council. It is submitted that the Council was in error in denying Evans a hearing thereon. See dicta in Richardson-Merrell,Inc. v. Koller, ——U.S.——, 105 S.Ct. 2757, 2763 (1985) and fn2; and dicta in In re Charge of J.M., 685 F.2d 1226, 1227 (Judicial Council, 9th Cir. 1982), Wright § 3939, fns12 & 16, 1986 Supplement Vol 16.

Both the trial court and the appellate court refused to comment upon Evans' contention that matter used in his defense could not be the bases of charges of misconduct, See Ex parte Bradley, 74 U.S. (7 Wall.) 364, 372,373 (1869) and Reply Brief at 4-6.

In respect of the First Amendment, Evans relies upon Thomas I. Emerson The System of Freedom of Expression, Random House 1970, Ch. XII Other Social Interests, C. Administration of Justice, 1. Criticism of the Court, pp. 449-459; directed to the fighting words defense, N.A.A.C.P. v. Clairborne Hardware Co., 458 U.S. 924, 928-29 (1982); for clear and present danger rule, Schenk v. United States, 249 U.S. 47, 52 (1919), Bridges v. California and Times Mirror Co. v. Superior Court, 314 U.S. 252 (1941), state

reports 14 C.2d 464, 96 P.2d 983, 1000 (1939) (dissent), and 15 C.2d 99, 98 P.2d 1029, 1041 (1940) (dissents), Wallace Mendelson, Clear and Present Danger—From Schenk to Dennis, 52 Col. L. Rev. 313 (1952), Roland L. Goldfarb The Contempt Power Col. U. Press 1963, pp 16-24, 70-78, 84-85, 89-100, 186-222, 290-299, Nelles & King, Contempt by Publication in the United States Since the Federal Contempt Statute, 28 Col. L. Rev. 525, 543-553 (1928); Elliot L. Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1 (1951); Frankfurter & Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1024-27, 1042, 1047 (1924); and in respect of declarations of opinion Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, ... N.E.2d ..... (12-3-86).

The trial and appellate courts rendered Evans short shrift on his claim that Judge Miller led him to believe that he would not be part of the three judge panel called for by Rule V D. and at least he should have advised Evans he would be part of the en banc panel. In fact Evans had no way of anticipating that an en banc panel would judge

the matter. Judge Miller also apparently instructed the Clerk to certify a totally inadequate record on appeal and Evans was required to write the Office of the Clerk of the trial court with copies to the Office of the Clerk of the appellate court and Judge Kaufman on March 18,1986, J.A. 126, in order to get the documents submitted by him made part of the record on appeal. He was unaware of Smalkin's Memorandum to Judge Black, the charging document, until counsel for the trial court requested it and he did not receive a copy until after the J.A. had been printed. As noted the attachments were never identified or made available to Evans. Evans submits that on the basis of his affidavit of bias, P.A. 89, J.A. 111, a failure of J. Miller to recuse himself was reversible error.

The appellate court's most egregious error was its finding that Evans was dangerous, P.A. 32, based upon the Greenfield opinion. The facts there were that Greenfield was suspended and his associate disbarred for circulating defamatory material about a judge to the Governor, District Attorney, Judicial Conference, and Presiding

Justice of the Second Department. Rothstein also by motion knowingly set forth false statements, gave false testimony at the judicial inquiry and converted funds of his law firm. Other disbarments based upon bizarre and perhaps psychotic behavior are Hawes, supra, and Application of Stone, 77 Wyo. 1, 53, 305 P.2d 777, cert denied, 352 U.S. 1026 (1957). If in fact the trial court viewed Evans as mentally disturbed it should have so charged him in order to permit his refutation by expert testimony. When cloaked with judicial immunity a court abuses its position in rendering without expert testimony findings on the mental capacity of a litigant.

The appellate court also refused to procure the attachments to the Memorandum of Smalkin from which his charges emanated. The trial court should have made both the Memorandum and Attachments available to Evans, and the appellate court's allowing on the request of counsel for the trial court the Memorandum but denying the attach-

ments is a patent lack of due process. This is particularly so in light of the fact that the trial court could have considered other documentary evidence that might have been damaging to him or required his explanation, or could have failed to consider documents offered in evidence by Evans without objection. The record is in such confusion it is impossible to determine if anything were considered by the panel but Evans' letter to Smalkin. In fact it appears that when Evans admitted writing the letter Judge Miller found him guilty of a breach of three disciplinary rules and determined to seek his disbarment. The delay perhaps was to insulate Smalkin's confirmation hearing from a minor dispute.

CANNONS

Cannon 1 of the Code of Professional Responsibility is entitled "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." Ethical Consideration (EC) 1-6 provides:

> An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not

> granted a license, or if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

Disciplinary Rule (DR) 1-102(A)(5) thereunder states:

> Misconduct
> (A) A lawyer shall not:
> (5) Engage in conduct that is prejudicial to the administration of justice.

Cannon 1 does not define or refer to the administration of justice except as set forth in DR 1-102(A)(5). The law of contempt, however, has considered the concept and in so far a freedom of expression is concerned it is dealt with elsewhere herein. Suffice to say that Evans' letter was written while the matter was on appeal and after any connection with the underlying case had passed out of Magistrate's Smalkin's concern. Clearly the letter and the complaint under 28 U.S.C. § 372 were not substitutes for or made on behalf of an appeal. Moreover it appears that misconduct may well be outside of DR 1-102(A)(5) by reason of EC 1-6. In any event the Show Cause Order did not cite or refer to EC 1-6 and did not put Evans on notice that he was a danger to the community because of mental disorder.

Cannon 7, A Lawyer Should Represent a Client Zealously Within the Bounds of the Law, clearly proscribes one who represents a client without his authority. EC 7-20 & 22 state:

> EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. * * *
> EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

DR 7-106 Trial Conduct at (C) In appearing in his professional capacity before a tribunal, a lawyer shall not

> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

It is submitted that the clear intent of DR 7-106(C)(6) is to take care of situations covered by F.R.Crim.P. 42 and only applies to conduct in court or so close thereto as to disrupt the proceedings therein. This Court is requested in its supervisory capacity over the federal courts to clearify the notion that the rule prohibits out-of-court conduct.

Cannon 8 A Lawyer Shall Assist in Improving the Legal System states at EC 8-6:

> EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence,and suitable temperment. * * * Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench * * * While a lawyer as a citizen has a right to **criticize such officials publicly**, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. [Emphasis supplied]

DR 8-102 Statements Concerning Judges or Other Adjudicatory Officers provides:

> (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

It is submitted that the question of knowing, false accusations is one of fact and the trial court was duty bound to grant Evans an opportunity to prove his state of mind and set forth in detail his objections to the Magistrate's Report. He also is entitled to an opportunity to question the Magistrate to ascertain the bases of his conclusion that allegations prepared by Evans in the Supplemental and Cross-Complaint were not made in good faith.

ORIGINAL BASIS OF JURISDICTION

The trial Court apparently thought it was proceeding under Local Rule 2A--Model Federal Rules for Disciplinary Enforcement—which it adopted March 1,1984. In fact as set forth herein at pp. 37-38 it failed to follow the prescribed procedures and proceeded sui generis by a so-called en banc consideration of Judge Miller's Report. In fact its Order only refers thereto although Evans had offered many documents in his defense. Thus the only remaining basis for its jurisdiction is the inherent power a court has to disbar or otherwise discipline an attorney admitted to practice before it.

REASONS FOR GRANTING WRIT

The history of contempt and the right to criticize a court is a long and complicated one with intervening legislation arrising out of the impeachment trial of Judge Peck and resulting in the overrulling of Toledo Newspaper Co. v. United States, 247 U.S. 402, 416 (1918) in Nye v. United States, 313 U.S. 33 (1940). See Nelles and King Contempt by Publication, 28 Col. L. Rev. 523, 543-553 (1928) for a scholarly critic of the tendency of the

judiciary to ignore the dictates of the First Amendment as well as F.R.Crim. P. 42 by imposing summary punishment for public criticism.

A recent trend seems to be developing of disciplining lawyers through the judge made or adopted Disciplinary Rules and in the process setting aside the safeguards forged over the years in respect of contempt. Clearly if a judge has a strong case he can do both, imprison for contempt and disbar in the contempt proceeding, United States v. Chapel, 480 F. Supp. 591 (D.C. Puerto Rico 1979). It appears that the contempt definition of obstructing justice which requires an actual as opposed to a theoretical obstruction does not apply in a disciplinary proceeding. In the case at bar Magistrate Smalkin could have sought a contempt citation rather than a disciplinary proceeding. 28 U.S.C. § 636(e). If he had proceeded by contempt there would not have been any question of the right to a hearing, the right to know in advance who the judge trying the matter would be, the right of seeking his recusal, and the right to a full record for purposes of review. Confrontation and subpoena powers are a fundamental due process right

that has been overlooked in disciplinary proceedings. Cf. Wright 3 Federal Practice and Procedure Criminal 2d §§ 707-711 and 1986 Pocket Part with procedures afforded Evans.

This Court has never upheld a contempt citation for out-of-court expressions critical of a court or its operations. Emerson, The System of Freedom of Expression at 456. It has denied certiorari occasionally in respect of disbarment. For example in Isserman v. Ethics Committee, 345 U.S. 927 (1952) (dissenting memorandum by Mr. Justice Black joined in by Mr. Justice Douglas) the lawyer who apparently lived and practiced primarily in California but who was also admitted in New Jersey was disbarred in New Jersey because of his dispute with Judge Medina while defending a client in Dennis v. United States, 183 F.2d 201 (2d Cir. 1950). See state proceedings, 9 N.J. 269, 316, 87 A.2d 903, and 88 A.2d 199 (1955) and also United States v. Sacher, 343 U.S. 1 (1952). Compare Ex parte Burr, 22 U.S. (9 Wheat.) 529 (1824) where the court noted that the period of suspension had nearly expired. Today with data banks and reciprocity among the various jurisdictions a

lawyer disbarred in one jurisdiction can expect similar treatment wherever he is admitted.

The view in Maryland is apparently much more stringent in disbarment than admission, In re G.L.S., 745 F.2d 856 (4th Cir. 1984). A private letter suffices to disbar, whereas a knowingly false statement under oath to secure admission passes muster in the state court.

This Court is urged to set forth the due process standards which must be met to disbar an attorney and thus subject him to disgrace as well as deprivation of the right to pursue his profession and secure his livelihood. If in fact Ex parte Bradley, 74 U.S. (7 Wall.) 363 (1869) and Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512 (1894) no longer are followed they should be overruled.

The implications of the reach of the First Amendment as well as the supervisory authority of this Court over inferior federal courts are additional reasons your petitioner urges in support of certiorari.

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Respectfully submitted,

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